

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Urban Comm-North Carolina, Inc.)
)
Petition for Reconsideration of)
Public Notice Announcing Auction)
of C and F Block PCS Spectrum)
)
Petition for Stay)
)

ORDER

Adopted: September 23, 2003

Released: September 23, 2003

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. The Wireless Telecommunications Bureau (“Bureau”) has before it two pleadings filed by Urban Comm-North Carolina, Inc. (“Urban Comm”): (1) a Petition for Reconsideration requesting that the Bureau reconsider its September 6, 2000 *Public Notice*,¹ which announced an auction (Auction No. 35) of C and F block Personal Communications Service (“PCS”) licenses, including licenses for spectrum previously licensed to Urban Comm;² and (2) a petition requesting a stay pending judicial review of the Commission’s actions taken pursuant to the Bureau’s *Public Notice*.³ In this Order, we grant in part and dismiss in part Urban Comm’s Petition for Reconsideration and dismiss its Petition for Stay.

¹ “C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000, Rescheduled for December 12, 2000; Revised List of Available Licenses; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Procedural Issues, *Public Notice*,” 15 FCC Rcd 17251 (2000) (“*Public Notice*”).

² See Petition for Reconsideration filed by Urban Comm-North, Inc. on October 6, 2000. Subsequently, on October 23, 2000, Urban Comm filed a Supplement to its Petition for Reconsideration for the sole purpose of submitting the affidavit of Sydney L. Small, the Chairman and CEO of Urban Comm. See Supplement to Petition for Reconsideration filed by Urban Comm-North, Inc. on October 23, 2000.

³ See Petition for Stay filed by Urban Comm-North, Inc. on October 6, 2000. Subsequently, on October 23, 2000, Urban Comm filed a Supplement to its Petition for Stay for the sole purpose of submitting the affidavit of Sydney L. Small, the Chairman and CEO of Urban Comm. See Supplement to Petition for Stay filed by Urban Comm-North, Inc. on October 23, 2000.

II. BACKGROUND

2. Urban Comm participated in the initial C and F block PCS auctions (Auction Nos. 5 and 11) and won ten C block licenses in Auction No. 5⁴ and thirteen F block licenses in Auction No. 11 (“Licenses”).⁵ These Licenses were financed pursuant to the Commission’s installment payment program.⁶

3. On March 31, 1997, the Commission suspended all further C block installment payments in order to evaluate restructuring requests made by certain licensees.⁷ On April 28, 1997, the installment payment suspension was extended to F block broadband PCS licenses.⁸ Subsequently, in a series of orders,⁹ the Commission offered various debt restructuring options for C block licensees, that included resumption of payments under existing notes and security agreements, disaggregation, amnesty or prepayment.¹⁰ Under the *Restructuring Orders*, the C block broadband PCS licensees were required to make an election from the various choices available to them by June 8, 1998, and to resume their payments pursuant to their elections by October 29, 1998, at the latest.¹¹

⁴ Petition for Reconsideration at 3. Urban Comm won licenses in Auction No. 5 that covered ten Basic Trading Areas (BTAs) in eastern North Carolina. The Commission conditionally granted these licenses to Urban Comm on September 17, 1996. See “FCC Announces Grant of Broadband Personal Communications Services Entrepreneurs’ C Block BTA License, Final Down Payment Due by September 24, 1996,” *Public Notice*, 11 FCC Rcd 11316 (1996).

⁵ Petition for Reconsideration at 3. Urban Comm won licenses in Auction No. 11 that covered thirteen BTAs in Virginia and South Carolina. The Commission conditionally granted these licenses to Urban Comm on April 28, 1997. See “FCC Announces Grant of Broadband Personal Communications Services D, E, F Block BTA Licenses Balance of Winning Bids (D and E Block) and Final Down Payment (F Block) Are Due by May 12, 1997,” *Public Notice*, 13 FCC Rcd 1286 (1997).

⁶ 47 C.F.R. §§ 1.2110, 24.711, 24.716 (1999).

⁷ See *In the Matter of Installment Payments for PCS Licenses*, *Order*, 12 FCC Rcd 17325 (1997).

⁸ See “FCC Announces Grant of Broadband Personal Communications Services D, E & F Block Licenses,” *Public Notice*, 13 FCC Rcd 1286 (1997).

⁹ See *In the Matter of Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, *Second Report and Order*, 12 FCC Rcd 16436 (1997) (“*Second Report and Order*”); *In the Matter of Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998) (“*First Reconsideration Order*”); *In the Matter of Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, *Second Order on Reconsideration of the Second Report and Order*, 14 FCC Rcd 6571 (1999) (“*Second Reconsideration Order*”). These orders are collectively referred to as the “*Restructuring Orders*.”

¹⁰ The various relief options were not made available to F block licensees. *Second Report and Order*, 12 FCC Rcd at 16447, ¶ 20.

¹¹ *Second Reconsideration Order*, 14 FCC Rcd at 6584-85, ¶¶ 25-26.

4. On May 29, 1998, Urban Comm requested that the Commission stay its June 8, 1998 election date.¹² Nonetheless, pursuant to the *Restructuring Orders*, Urban Comm made a timely election to resume payments.¹³ Subsequently, on October 15, 1998, Urban Comm sought a waiver of the October 29, 1998, deadline for late payments.¹⁴ On October 28, 1998, one day before the date on which it was required to make payment to the Commission, Urban Comm filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code.¹⁵

5. On September 6, 2000, the Bureau issued a *Public Notice* announcing Auction No. 35, which included spectrum formerly licensed to Urban Comm.¹⁶ On October 6, 2000, Urban Comm filed its Petition for Reconsideration of the Bureau's *Public Notice* with the Commission. Specifically, Urban Comm sought a postponement of Auction No. 35 and requested that the Commission defer any further action on its Licenses until its pending bankruptcy litigation is concluded.¹⁷ Urban Comm argues that without the Licenses, liquidation of its business would be inevitable, causing it to suffer "irreparable" harm.¹⁸ In its Petition for Reconsideration, Urban Comm states that the Commission's refusal to provide reasonable opportunities for C block licensees to resolve their bankruptcy proceedings, and to insist instead upon an auction before their bankruptcy proceedings have concluded is arbitrary and capricious and an abuse of discretion under the Administrative Procedure Act (APA).¹⁹

6. On October 6, 2000, Urban Comm also filed a petition requesting that the Commission stay Auction No. 35 pending judicial review of the Commission's actions taken pursuant to the Bureau's *Public Notice*.²⁰ In its Petition for Stay, Urban Comm argues that unless the Commission or the D.C. Circuit intervenes to preserve the *status quo*, the Licenses will have been reauctioned to other businesses

¹² See Petition for Stay filed by Urban Comm-North, Inc. on May 29, 1998. The Commission denied a similar request made by NextWave, but did not rule on Urban Comm.'s Petition for Stay at this time. See *Second Reconsideration Order*, 14 FCC Rcd at 6575, n. 22.

¹³ Petition for Reconsideration at 4.

¹⁴ See Petition for Extension of Interest Payment Date filed by Urban Comm-North, Inc. on October 15, 1998. The Commission subsequently denied this request. In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Order*, 13 FCC Rcd 22071 (1998).

¹⁵ See *In re Urban Communicators PCS limited Partnership*, Case Nos. 98-B-47996, 98-B-47997, 98-B-10086 (Bankr. S.D.N.Y. 1998) (Jointly Administered) ("*Urban Comm. Bankruptcy Proceeding*").

¹⁶ *Public Notice*, 15 FCC Rcd 17251.

¹⁷ See Petition for Reconsideration at 8.

¹⁸ Petition for Reconsideration at 6.

¹⁹ *Id.* at 7-8.

²⁰ See Petition for Stay. In its Petition for Reconsideration, Urban Comm references its Petition for Stay noting that its arguments are more specifically set forth in its Petition for Stay. See Petition for Reconsideration at 3, n. 1.

without judicial review of the lawfulness of the Commission's actions.²¹ Urban Comm states that the Commission's actions are contrary to the APA and the U.S. Bankruptcy Code.²² Finally, Urban Comm argues that an auction of its Licenses will threaten liquidation of its business.²³ On November 13, 2000, Urban Comm also filed an emergency motion with the D.C. Circuit requesting a stay or injunction pending appeal of the Commission's decision to auction spectrum associated with the Licenses previously granted to Urban Comm.²⁴

7. In December 2000, the D.C. Circuit dismissed as moot Urban Comm's Emergency Motion for a Stay or Injunction, holding that the motion was incurably premature in light of Urban Comm's pending Petition for Reconsideration before the Commission.²⁵ In January 2001, the Commission completed Auction No. 35.²⁶

8. On August 1, 2001,²⁷ Urban Comm supplemented its prior filings to ask the Commission to take notice of the D.C. Circuit's June 22, 2001 decision in *NextWave v. FCC*.²⁸ In light of the Court's decision in that case, Urban Comm requested expedited review of its Petition for Reconsideration and reinstatement of its Licenses.

²¹ Petition for Stay at 3.

²² *Id.* at 4-9. Specifically, Urban Comm argues that the Commission's actions violate Section 706(2)(A)(C) of the APA, and Sections 525, 1123 and 362(a)(3), (4), (5) of the U.S. Bankruptcy Code. *Id.*

²³ *Id.* at 3-4. Urban Comm recently indicated in *ex parte* meetings with the Bureau that it continues to pursue its reorganization efforts under Chapter 11 of the Bankruptcy Code.

²⁴ *Urban Comm-North Carolina, Inc., v. FCC*, No. 00-1430 (D.C. Cir. Nov. 13, 2000); *see also Urban Comm-North Carolina, Inc.*, Amended Petition for Writ of Mandamus, No. 01-1490 (D.C. Cir. Nov. 14, 2001) (requesting the court issue a writ directing the Commission to act upon its Petition for Reconsideration and grant the requested relief).

²⁵ *Urban Comm-North Carolina, Inc., v. FCC*, Order, No. 00-1430 (D.C. Cir. Dec. 4, 2000). The same order denied Urban Comm's alternative request for mandamus relief. *Id.* Subsequently, the D.C. Circuit denied Urban Comm's amended petition for mandamus relief. *Urban Comm-North Carolina, Inc.*, No. 01-1490 (D.C. Cir. March 26, 2002).

²⁶ "C and F Block Broadband PCS Auction Closes; Winning Bidders announced; Down Payments Due February 12, 2001, FCC Forms 601 and 602 Due February 12, 2001; Ten-Day Petition to Deny Period," *Public Notice*, 16 FCC Rcd 2339 (2001). Subsequently, the Commission dismissed long-form applications and refunded down payments to eligible Auction No. 35 winning bidders of spectrum associated with licenses previously issued to NextWave and Urban Comm. *See Disposition of Down Payment and Pending Applications By Certain Winning Bidders in Auction No. 35; Requests for Refunds of Down Payments Made In Auction No. 35, Order and Order on Reconsideration*, 17 FCC Rcd 23354 (2002); *Requests for Refunds Of Down Payments Made In Auction No. 35, Order*, 17 FCC Rcd 6283 (2002).

²⁷ *See Request for Expedited Review* filed by Preben Jensen and Charles E. Simpson, Attorneys for Urban Comm-North Carolina, Inc. on August 1, 2001 ("Request for Expedited Review").

²⁸ *NextWave v. FCC*, 254 F.3d 130 (D.C. 2001), *aff'd*, 537 U.S. 293, 123 S.Ct. 832 (2003).

III. DISCUSSION

9. Since the filing of Urban Comm's Petition for Reconsideration of the Commission's Auction 35 *Public Notice*, Auction 35 was completed as noticed²⁹ and, therefore, Urban Comm's Petition for Reconsideration was largely mooted. To the extent, however, that the Petition for Reconsideration sought clarification of the status of Urban Comm's licenses, the U.S. Supreme Court's recent decision in *FCC v. NextWave* controls.³⁰ We clarify that because Urban Comm was under the protection of Chapter 11 of the U.S. Bankruptcy Code at the time it defaulted on its license payment obligation, the Commission's automatic cancellation rule was ineffective.³¹ We therefore grant Urban Comm's Petition for Reconsideration to that limited extent and otherwise dismiss it and the pending Petition for Stay as moot; we also dismiss the Request for Expedited Review.³²

IV. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, Urban Comm's Petition for Reconsideration is GRANTED to the extent stated herein and otherwise DISMISSED as moot, Urban Comm's Petition for Stay is DISMISSED as moot, and Urban Comm's Request for Expedited Review is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

John B. Muleta
Chief
Wireless Telecommunications Bureau

²⁹ See *Supra* n. 24.

³⁰ See *FCC v. NextWave*, 537 U.S. 293, 123 S.Ct. 832, 840 (2003).

³¹ *Federal Communications Commission v. NextWave Personal Communications, et al.*, 537 U.S. 293, ___, 123 S.Ct. 832, 840 (2003)(noting that the D.C. Circuit "prevented the FCC from violating §525 by canceling licenses because of failure to pay debts dischargeable by bankruptcy courts").

³² In addition, we note that on July 24, 2003, Urban Comm filed a Petition for Reinstatement of Licenses requesting, among other things, tolling of all deadlines and obligations related to its licenses since October 30, 1998.³² To the extent this Petition makes additional requests for relief beyond the simple clarification provided here, we will address such requests for equitable relief in a separate order.